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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 598

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

GEORGE GRAVES DIXON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Petitioner,

v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Pacific Mutual Life Insurance Company, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the judgment of that court entered in this case on June 19, 1959, which affirmed a judgment of the United States District Court for the Southern District of New York in respondent's favor upon a decision of the court that a release executed by respondent was null and void and not a bar to the action and upon a jury verdict (R. 148a-153a).

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (R. 265(a)) is reported in 268 F. 2d 812. A copy thereof is set forth in the Appendix, *infra*, page 21.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit sought to be reviewed is dated June 19, 1959 and said judgment was entered on June 19, 1959 (R. 274(a), 275(a)). A copy thereof is set forth in the Appendix, *infra*, page 30.

On July 18, 1959, petitioner filed in the Court of Appeals its motion for leave to file a petition for rehearing on or before August 14, 1959 (R. 276(a), 281(a)). The motion was granted by an order dated July 24, 1959 (R. 282(a)). A petition for rehearing was filed on August 14, 1959 (R. 285(a)) and on September 22, 1959, the Court of Appeals made and entered its order denying the petition for rehearing (R. 299(a), 300(a)). No opinion was rendered in connection with the order denying the rehearing.

The Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. § 1254(1), 28 U.S.C.A. § 1254(1), confers on this Court jurisdiction to review said judgment of the Court of Appeals for the Second Circuit by writ of certiorari.

Questions Presented

(b) Whether in a diversity of citizenship action the United States Court of Appeals for the Second Circuit was required to follow the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), and its progeny and apply the law of New York with respect to the substantive issues involved in the action?

(2) Where under New York law an insured, whose occupation is stated as a physician and surgeon in a policy insuring him against continuous, necessary and total loss of all business time, is not entitled to recover total disability benefits thereunder unless he was disabled both as a physician and surgeon, was the decision of the United States Court of Appeals for the Second Circuit that, despite the insured's admission that during the period for which total disability benefits are claimed he was functioning as a physician and practicing medicine, he was totally disabled within the meaning of the policy and entitled to recover such benefits contrary to the *Erie* doctrine?

(3) Where under New York law compliance with a clause in a policy of disability insurance providing that it does not cover any disability for which the insured is not necessarily and regularly attended by a legally qualified physician other than himself is a prerequisite to recovery for alleged disability benefits, was the decision of the United States Court of Appeals for the Second Circuit that, despite the admissions by the insured physician and surgeon of noncompliance with such requirement during the period for which he claimed benefits because of a curable skin infection of his hands, he was entitled to recover such disability benefits contrary to the *Erie* doctrine?

(4) Where under New York law it would be the duty of the trial court to dismiss the complaint or nonsuit a plaintiff or direct a verdict for defendant when plaintiff's own testimony clearly precludes his recovery, was the decision of the United States Court of Appeals for the Second Circuit that, in spite of respondent's own testimony clearly precluding his recovery, the trial court did not err in denying petitioner's motions to dismiss, for the direction of a verdict or for judgment notwithstanding the verdict, contrary to the *Erie* doctrine?

(5) Where under New York law a release executed by respondent would be held to be a bar to the action because of respondent's failure to rescind a release given by him of the claim upon which his action is based or seek its rescission, was the decision of the United States Court of Appeals for the Second Circuit that, in spite of such failure, the release was not a bar to the action contrary to the *Erie* doctrine?

(6) Where under New York law a mistaken belief in a statement of petitioner's claims representative that if respondent, a physician and surgeon, took up employment with a Veterans Administration Hospital he would not be entitled to future disability benefits is not a mistake as to an existing fact but merely an expression of opinion or of law not warranting the avoidance of a release given by him thereafter in settlement of a claim for disability benefits, was the decision of the United States Court of Appeals for the Second Circuit holding the release void and not a bar to the action contrary to the *Erie* doctrine?

(7) Whether the decision of the United States Court of Appeals for the Second Circuit in this case on law other than New York law was an invasion of the independent authority of the State of New York and the independence of its courts and, therefore, unconstitutional?

(8) Where under New York law recovery may be had in an action at law only for the specific amount due at the time of the commencement of the action, was the decision of the United States Court of Appeals for the Second Circuit upholding the allowance by the trial court of the filing of a supplemental complaint pursuant to Federal Rule of Civil Procedure 15(d), 28 U.S.C.A. seeking monthly disability benefits to the date of trial and sustaining a recovery therefor contrary to the *Erie* doctrine and did the application of Rule 15(d) abridge petitioner's substantive rights in violation of the Rules Enabling Act, 62 Stat. 961?

The Constitutional Provision, Statutes and Federal Rule of Civil Procedure Involved

The provision of the Constitution involved is:

AMENDMENT X—RESERVED POWERS TO STATES

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The statutes involved are:

(1) Act of June 25, 1948, c. 646, 62 Stat. 944, 28 U.S.C. § 1652, 28 U.S.C.A. § 1652;

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(2) Act of June 25, 1948, c. 646, 62 Stat. 961, 28 U.S.C. § 2072, 28 U.S.C.A. § 2072:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. * * *

The Federal Rule of Civil Procedure involved is rule 15(d), 28 U.S.C.A., reading:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit

him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Statement of the Case

This action at law was commenced in the City Court of the City of New York in July, 1954 and removed to the United States District Court for the Southern District of New York because of the diversity of citizenship of the parties and jurisdictional amount.

Respondent sought to recover monthly disability benefits from June 22, 1953 to the date of trial for an alleged loss of all business time due to dermatitis of the hands (R. 6a-7a) upon a policy of non-cancellable health and accident insurance issued in New York City, which insured him against "continuous, necessary and total loss of all business time" in his occupation of a "Physician and Surgeon" resulting from sickness (R. 132a, 134a). The policy provided that the insurance does not cover any disability for which respondent "is not necessarily and regularly attended by a legally qualified physician other than" himself and that this requirement shall be waived only if such attendance is declared by medical authority satisfactory to petitioner to be unnecessary (R. 134a).

Petitioner's answer denied the allegations of disability and set up affirmative defenses of release and accord and satisfaction (R. 9a-10a). At a pre-trial conference the trial judge permitted respondent to file a supplemental complaint alleging a claim for monthly benefits of $351.60 from January 27, 1953 to the date of trial less the sum paid respondent against the release given by him under the settlement (R. 11a). The supplemental complaint was

allowed over petitioner's objection that any claim for monthly benefits arising after the institution of the suit may not be asserted as a matter of New York substantive law in view of the decision in *Morgan* v. *Aetna Life Ins. Co.*, 157 F. 2d 527 (7 Cir. 1946). The denials and defenses in the answer were deemed to apply to the supplemental complaint, which respondent called an amended complaint (R. 11a-12a, 157a). Both the complaint and supplemental complaint failed to allege a prior rescission of the release and did not seek its rescission. Therefore, under New York law the release was a complete bar to the action. To avoid the bar respondent asserted before the trial judge that the release was executed and delivered under a mutual mistake of fact in that at the time he and petitioner's claims representative were mistaken in believing that if respondent took any position with the Veterans Administration he would not be entitled to any benefits in the future under the policy (R. 95a). The case proceeded to trial on three issues, namely, the validity of the release, whether respondent was totally disabled within the meaning of the policy, and the amount of damages or benefits, if any. These issues were tried before a jury, but pursuant to the trial court's ruling the issue as to the validity of the release was tried to the court with the jury as an advisory jury (R. 12a-14a). Respondent's evidence established the following facts:

In 1949 and in 1951 respondent developed dermatitis of the hands and on both occasions consulted a dermatologist. The condition cleared and he continued his practice (R. 16a-18a, 22a, 259a). On September 23, 1952 he again developed dermatitis of the hands and first consulted a dermatologist on September 30, 1952 (R. 19a, 48a, 51a). He continued to practice until October 27, 1952 (R. 97a, 137a) when he notified petitioner that as of that date he was unable to attend to his practice because of his condition (R. 138a). He stipulated (R. 164a) that he was then separately insured for disability resulting from sickness with four companies under disability policies providing

for weekly benefits totalling $325 and with one company under a policy providing for a monthly benefit of $300 (R. 90a, 137a). He also filed claims for disability benefits with these other companies. In March, 1953 he submitted to petitioner two reports of his attending physician which stated that his condition was "improving" (R. 139a, 141a). In the same month he applied to the Veterans Administration, Department of Medicine and Surgery, for an appointment in the specialty of physical medicine and rehabilitation (R. 22a, 96a). The standards of physical requirements of the Veterans Administration specify that acute dermatitis would be a bar to such an appointment. In connection with his application he was given a physical examination and found to have a "slight" dermatitis of his hands (R. 23a-24a).

In May, 1953 petitioner's claims representative disputed the claim and suggested that it be settled (R. 87a). While respondent testified (R. 87a) that petitioner's representative also told him that if respondent took any position with the Veterans Administration he would not be entitled to future benefits under the policy, this statement was unequivocally denied by the representative (R. 77a, 85a). A release was prepared and mailed to respondent. It contained a provision to the effect that a mutual mistake as to the true facts in connection with or underlying the controversy settled shall not affect the validity or finality of the release or the settlement (R. 143a). The respondent executed the release on May 9, 1953 because he "was getting rather short of money" and "needed money at that time", caused his signature to be witnessed by his office assistant, returned the release to the claims representative, and then received petitioner's check for $1411.22 dated May 11, 1953 (R. 93a, 145a). He was then represented by his present attorney in connection with his claims against the other insurance companies which were also settled, but he did not see fit to consult him on the settlement with petitioner (R. 93a-94a). At no time prior to

the institution of the action did he notify petitioner that the release was executed by him under a mistake of fact (R. 98a). His attorney wrote petitioner on August 27, 1953 advising that respondent had retained him in connection with his disability rights under the policy (R. 263a), but the letter does not mention the release and does not contain any language expressing a positive, unequivocal rejection, disclaimer or renunciation of the release.

On August 16, 1953 respondent, whose application for a position with the Veterans Administration had been approved, assumed his duties as Chief, Physical Medicine and Rehabilitation, a major service in all Veterans Administration hospitals, and chairman of the Medical Rehabilitation Board at the Knoxville, Iowa, Veterans Administration Hospital (R. 24a, 27a-28a). This hospital was in the charge of a manager who had the same status as a hospital superintendent (R. 24a). Respondent's duties constantly required him to review, evaluate and study the progress of cases assigned for medical and rehabilitation therapy, and to interview and examine the patients and prescribe the necessary therapy (R. 31a, 33a-34a, 47a-48a). He admitted that he was functioning as a physician and practicing medicine at this hospital and that he never ceased practicing medicine (R. 33a-34a, 37a-40a). In 1954 he became Director of Professional Services and Chairman of the Research Committee at the Veterans Administration Hospital, Fort Harrison, Montana, which is in charge of a manager. His duties were medical and in the performance thereof he was technically practicing medicine (R. 44a, 45a-47a).

He also testified that he did not consult any dermatologist for treatment of his hands while at the Knoxville hospital although there was a dermatologist on its attending staff (R. 40a); that he did see a psychiatrist and neurologist on its staff about eight times between October 1953 and May 1954 and not thereafter, but did not undergo any treatment (R. 41a-43a, 44a); that he did not consult a

dermatologist or any other physician for treatment while at the Fort Harrison hospital (R. 46a). Indeed, he did not think it advisable to consult a dermatologist for treatment throughout the entire period (R. 44a; 193a) and in answer to the question whether the dermatitis condition which he had in 1952 barred him from practicing medicine, he answered that it "does not bar" him "from practicing medicine the way" he had been doing it (R. 35a).

The dermatologist who had attended respondent for his condition before respondent left New York in August 1953, testified that he did not consider respondent's condition incurable (R. 54a); that if respondent had continued the treatment which he had prescribed respondent's dermatitis would have cleared up so that respondent could do surgery (R. 56a, 58a); and that he had no knowledge of the condition of respondent's hands at any time after July, 1953, when respondent last visited him (R. 54a-55a).

At the end of the evidence (R. 100a) petitioner renewed a motion to dismiss made at the close of respondent's case (R. 59a) and for the direction of a verdict for petitioner. The motion was denied (R. 101a). On the motion for a directed verdict the court sustained petitioner's contention that there was no proof of fraud or duress in the procurement of the release but denied the motion on the ground that there was an issue as to whether the release was given under a mutual mistake of fact which would go to the jury as an advisory jury (101a-102a).

The case was submitted to the jury on three special interrogatories covering the issue as to the validity of the release and three special interrogatories covering the issue as to respondent's total disability and damages, if any (R. 120a). The interrogatories covering the validity of the release were answered by the jury in the affirmative (R. 125a). The jury also answered in the affirmative the interrogatories covering respondent's total disability and, finding that he sustained a continuous, necessary and total

loss of all business time as a physician and surgeon from October 27, 1952 to June 30, 1958, the last day of trial, brought in a verdict in respondent's favor for $21,489.56 representing the monthly benefits for such period less the amount paid by petitioner on the settlement (R. 125a-126a).

Petitioner's motion to reject the jury's advisory verdict on the issue of the validity of the release and for judgment in petitioner's favor dismissing the complaint was denied (R. 129a, 130a, 131a). Thereupon petitioner moved for judgment *non obstante veredicto*, which motion was also denied (R. 131a). Thereafter the court, adopting the advisory verdict, rendered its decision, finding that (1) at the time of the execution and delivery of the release both petitioner and respondent believed that employment of respondent in the Veterans Administration Hospital would bar respondent from total disability benefits under the policy, that they were both mistaken in such belief, and that respondent promptly under all the circumstances repudiated the release; and (2) concluding, as a matter of law, that the release is null and void and not a bar to the action (R. 148a-150a). Judgment was entered declaring the release null and void and not a bar to the action and awarding judgment in respondent's favor for $24,977.03 (R. 151a, 153a). On petitioner's appeal, the judgment was affirmed.

Reasons Relied On for the Allowance of the Writ

1. The decision of the Court of Appeals is in conflict with and does not give effect to the applicable substantive law of New York on six decisive points.

(a) The decision that respondent was totally disabled as a physician and surgeon within the meaning of the policy, although he admitted that (1) he was practicing medicine as Chief Physical Medicine and Rehabilitation

and Chairman of the Medical Board at the Iowa Veterans Administration hospital and as Director of Professional Services and Chairman of the Research Committee at the Fort Harrison hospital and (2) the alleged dermatitis condition does not bar him from practicing medicine the way he had been doing it (R. 35a), is in conflict with and does not give effect to *McGrail* v. *Equitable Life Assurance Society*, 292 N. Y. 419, 55 N. E. (2d) 483 (1944). There, a physician and surgeon was insured under a policy entitling him to a weekly indemnity for total disability arising from accidental injury which should wholly and completely disable him from the date of the accident and prevent him from performing any and every duty pertaining to his occupation. The highest court of New York pointed out (p. 425) that his occupation was "that of physician and surgeon when the policy was written" and that if he was not capable of performing and did not perform any substantial part "of any of his duties as a doctor, as a physician and surgeon" could it be said that he was totally disabled within the meaning of the policy from performing any and every duty pertaining to his occupation. The Court of Appeals ignored this case and the opinion does not refer to or discuss any other New York case on the point.

(b) The decision of the Court of Appeals that respondent was entitled to recover disability benefits, notwithstanding (1) the policy provision excluding coverage for any disability for which he was not necessarily and regularly attended by a legally qualified physician, (2) his admissions that he was not treated for the alleged dermatitis condition at any time after he left New York in August 1953 and did not think it advisable to do so (R. 40a, 41a-44a, 46a, 193a), and (3) the testimony of the dermatologist who attended him before he left New York that his condition was not incurable and that it would have cleared up so that respondent could do surgery if he had continued treatment (R. 54a, 56a, 58a), is in conflict with and does

not give effect to the decisions of the New York intermediate appellate courts in *Hunter* v. *Federal Casualty Co.*, 199 App. Div. 223, 191 N.Y.S. 474 (1921); *Bishop* v. *United States Casualty Co.*, 99 App. Div. 530, 91 N.Y.S. 176 (1904); *Campana* v. *Ridgely Protective Ass'n*, 186 N.Y.S. 82 (Sup. Ct., App. T., 1921). These decisions stand for the proposition that where a policy of disability insurance excludes liability for any period during which the insured is not attended by a qualified physician the insured is not entitled to recover in a New York Court when there was no attendance by such a physician during the insured's illness. The Court of Appeals disregarded these decisions and the opinion does not refer to any other New York authorities on this point.

(c) The decision of the Court of Appeals that there was no error in denying petitioner's motions to dismiss, for the direction of a verdict or for judgment notwithstanding the verdict, notwithstanding respondent's own testimony that he was functioning as a physician and practicing medicine and that he did not receive regular treatment for the alleged dermatitis condition after he left New York in August, 1953 and did not think it advisable to do so, is in conflict with and does not give effect to *Lomer* v. *Meeker*, 25 N. Y. 361 (1862), *Kelly* v. *Burroughs*, 102 N. Y. 93, 6 N. E. 109 (1886), *Dwight* v. *Germania Life Ins. Co.*, 103 N. Y. 341, 8 N. E. 654 (1886) and *Hull* v. *Littauer*, 162 N. Y. 569, 57 N. E. 102 (1900), which held that it is the duty of the court to sustain a demurrer to evidence or grant a motion for a directed verdict whenever the facts established and conclusions reasonably justified are legally insufficient as the foundation for a verdict in favor of plaintiff, and that the refusal to do so is error in point of law. The *Lomer*, *Kelly* and *Hull* decisions were followed by this court in *Chesapeake & O. Ry. Co.* v. *Martin*, 283 U. S. 209, 213-214 (1931). The Court of Appeals disregarded these authorities and the opinion does not refer to any New York cases on this point.

(d) The decision of the Court of Appeals that, notwithstanding respondent's failure to rescind the release given by him on the settlement of his claim or seek its rescission, the release was not a bar to the action is directly in conflict with and does not give effect to *Frehe* v. *Schildwachter*, 289 N. Y. 250, 45 N. E. (2d) 427 (1942), and *Frankenheim* v. *Altman & Co.*, 1 A. D. 2d 200, 149 N.Y.S. 2d 11 (1956). The *Frehe* case held that a release, unless rescinded, is a complete bar to an action to recover on a claim which has been released. In the *Frankenheim* case, which involved a negligence action in which the complaint failed to mention and allege rescission of a release set up as an affirmative defense, the Appellate Division said (pp. 201-202):

> "The release, unless rescinded, is a complete bar to this action. (*Frehe* v. *Schildwachter*, 289 N. Y. 250, 253.) * * * Rescission can be effected before action, e.g., by payment of the sum received under the release, or by an action, on appropriate grounds. * * *
>
> "Unrescinded, however, the release affords a proper basis for dismissal of the complaint."

The Court of Appeals ignored these authorities and the opinion does not refer to any other New York authorities on this point.

(e) The decision of the Court of Appeals that, notwithstanding the trial court's ruling that there was no proof of fraud in the procurement of the release, a mistaken belief in the alleged statement of petitioner's claims representative that if respondent took a position with the Veteran's Administration Hospital he would not be entitled to future disability benefits under the policy warranted the avoidance of the release is in direct conflict with and fails to give effect to the decisions in *Jacobs* v. *Morange*, 47 N. Y. 57 (1871); *Dambmann* v. *Schulting*, 75 N. Y. 55 (1878); *Garnee* v. *Hasbrouck*, 267 N. Y. 57, 195 N. E. 683 (1935); *Hynes* v. *Title Guarantee and Trust Company, et al.*, 273

N. Y. 612, 7 N. E. (2d) 719 (1937); *Mack* v. *Albee Press, Inc.*, 263 App. Div. 275 *aff'd* 288 N. Y. 623, 42 N. E. (2d) 617 (1942); *Dominicis* v. *United States Casualty Co.*, 132 App. Div. 553, 166 N.Y.S. 975 (1909) and *Miles* v. *New York Central Railroad Co.*, 195 App. Div. 748, 185 N.Y.S. 941, *appeal dismissed*, 233 N. Y. 644 (1922). The *Mack*, *Dominicis* and *Miles* cases held that to have a release of claims rescinded for mistake it must be shown that it was executed under a mutual mistake as to an existing fact. The *Dambmann* case held that ignorance of a fact, extrinsic and not essential to a contract but which, if known, might have influenced the action of a party to the contract, is not such a mistake as will authorize equitable relief; that as to such facts, the party must rely upon his own vigilance and that if not imposed upon or defrauded, he will be held to his contract. In the *Garnee* case the court held that the expression of an opinion that plaintiff would receive nothing except through settlement was not a fraudulent representation warranting the avoidance of a release executed by plaintiff upon the settlement. In the *Jacobs* and *Hynes* cases it was held that a court of equity cannot grant relief on the ground of a mistake of law.

The Court of Appeals disregarded these decisions and rested its conclusion upon decisions of the United States Court of Appeals for the District of Columbia Circuit and a Texas court which are inapplicable in the light of *Erie Railroad Co.* v. *Tompkins* and which are distinguishable from the case at bar because they involved a mistake as to an existing fact. The Court of Appeals referred to *Hudson* v. *Glens Falls Ins. Co.*, 218 N. Y. 133, 112 N. E. 728 (1916), which has no relevancy, since there the complaint was in equity for the rescission of a settlement of a claim on a policy of insurance based on fraud and misrepresentation which induced the settlement, whereas here the respondent

did not seek a rescission of the release and the trial court ruled (R. 101a) that "there is not one scintilla of proof in this record of either fraud or duress and no issue of fraud or duress will go to the jury."

(f) The decision of the Court of Appeals upholding the allowance by the trial court of the filing of a supplemental complaint pursuant to Federal Rule of Civil Procedure 15(d) 28 U.S.C.A. seeking monthly disability benefits to the date of trial and sustaining a recovery therefor is in conflict with and fails to give effect to the decision in *Boisserain* v. *Boisserain*, 252 N. Y. 178, 169 N. E. 130 (1929), in which the complaint sought installments of monies in arrears and to "the date of the entry of judgment in" the action. The court held that "recovery may be had in an action at law only for the specific amount due at the time of the commencement of the action" (p. 181). The Court of Appeals disregarded this authority and the opinion does not refer to any other New York authorities on this point. Even if New York procedural law were to be considered as controlling, the service of an amended complaint in an action to recover benefits for total and permanent disability in order to bring the claim up to date would not be justified. *Leebarg* v. *The Travelers Insurance Company*, 257 App. Div. 852, 853 (1939).

2. The decision of the Court of Appeals in declining to apply the law of New York, as announced in the decisions above referred to, is in conflict with the decisions of this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), and its progeny down to *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U. S. 198 (1956).

In *Erie* this Court held that henceforth federal courts in diversity cases would apply the common law rules of the States in which they were sitting. Relying upon the *Erie* doctrine, this Court in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 (1945), stated that the intent of *Erie* "was to insure that, in all cases where a federal court is

exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." There is present here the certainty that a different result would follow if the case were tried in a New York court. The Court of Appeals exercised an independent judgment, uncontrolled by New York law as declared by its highest and intermediate courts. In effect, the Court of Appeals has decided—contrary to the *Erie* doctrine—that New York law shall not be treated as its law and that the case shall be governed by some other law. If the decision of the Courts of Appeals is allowed to stand a situation results typical of the kind this Court was endeavoring to prevent by its decision in *Erie*, namely, lack of uniformity in the administration of the law of the State.

Furthermore, the *Erie* doctrine has at its foundation the constitutional autonomy and independence of the States. *Erie* made clear that the Congress has no power to control the private law applicable in the States and "no clause in the Constitution purports to confer such a power upon the federal courts". The conclusion was expressed by the Court that "in applying the doctrine [of *Swift* v. *Tyson*], this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states." As stated by this Court in *Guaranty Trust* v. *York*, *Erie* "expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts." In failing to apply the *Erie* doctrine, the Court of Appeals invaded the authority of the State of New York and denied its independence. See Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 512 (1954).

3. The Court of Appeals has decided an important question of federal law involving the valid application of Rule

15(d) of the Federal Rules of Civil Procedure, which has not been, but should be, authoritatively settled by this Court.

The Rules Enabling Act empowering this Court to prescribe rules of Civil Procedure expressly provides that the rules "shall neither abridge, enlarge * * * the substantive rights of any litigant", thereby recognizing the distinction between substantive law, which creates and defines the duties of litigants, and the procedural or adjective law, which prescribes the court practice, means or method for administering substantive law.

This Court said in *United States* v. *Sherwood*, 312 U. S. 584, 590 (1941), that the Congressional authorization to this Court to prescribe rules of procedure in civil actions, "gave it no authority to modify, abridge or enlarge the substantive rights of litigants * * *." Under the holding of *Guaranty Trust Co.* v. *York*, if the state law does "significantly affect the result of a litigation" and "the outcome of the litigation" it constitutes the substantive law of the state and should be followed. Thus, in the diversity cases of *Ragan* v. *Merchants Transfer & Warehouse Company, Inc.*, 337 U. S. 530 (1949), which involved Rule 3 of the Federal Rules, *Woods* v. *Interstate Realty Co.*, 337 U. S. 535 (1949), which, although not specifically mentioned in the decision, involved Rule 17(b), and *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U. S. 541 (1949), which involved Rule 23, this Court followed the *Erie* doctrine and applied the local state law in matters specifically covered by the Rules. Here, New York law significantly affects the outcome of the case for, assuming respondent was totally disabled within the meaning of the policy, his condition was incurable, and he had not released his claim, respondent would not be entitled in a New York court to recover more than the specific amount due at the time of the commencement of the action and, therefore, the application of Rule 15(d) by allowing the filing of a supplemental complaint seeking a recovery for monthly benefits to the date of trial was invalid.

4. The decision of the Court of Appeals upholding the filing of the supplemental complaint to recover monthly disability benefits to the date of trial and sustaining a recovery therefor is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Morgan* v. *Aetna Life Ins. Co.*, 157 F. 2d 527 (1946).

The *Morgan* case involved an action to recover on a disability policy and presented the issue whether the trial court erred in granting disability recovery to the date of judgment, instead of to the date of the commencement of suit. The trial court's judgment granted recovery not only to the date of commencement of suit but to the date of judgment. The Court of Appeals for the Seventh Circuit held that it was erroneous to grant recovery for any time after commencement of the suit and said (p. 530):

> "* * * Appellee cogently argues that we should consider the complaint amended to conform to the proofs, in compliance with Rule 15(b) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c. But the obstacle to greater recovery does not arise out of any deficiency in pleading; it seems to be a matter of policy or substantive law that contracts providing for installment payments, the payment of which is predicated upon certain conditions precedent, can not be enforced until due, unless there be complete repudiation or renunciation of the contract, which is not the case here."

5. In refusing to apply New York law as required by *Erie*, the Court of Appeals has so far departed from the accepted and usual course of proceedings in a matter affecting not only the correctness of its decision but the administration of the system of federal justice, as to call for an exercise of this Court's power of supervision.

6. In view of the foregoing, review by this Court of the judgment of the Court of Appeals would be in the interest of the law and in its exposition and enforcement.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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Appendix.

1. Opinion of the Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 212—October Term, 1958.

(Argued March 10, 1959 Decided June 19, 1959.)

Docket No. 25332

GEORGE GRAVES DIXON,

Plaintiff-Appellee,

—v.—

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Defendant-Appellant.

Before:

WASHINGTON, WATERMAN and MOORE,

Circuit Judges.

Appeal from a judgment in favor of plaintiff entered in the United States District Court for the Southern District of New York after trial before Sugarman, *D.J.*, and a jury. Suit was brought to recover disability payments on an income policy issued by defendant.

Affirmed.

LEON WASSERMAN, Esq., New York, N. Y. (Norman Meltzer, Esq., on the brief), *for Plaintiff-Appellee.*

Appendix.

HENRY I. FILLMAN, Esq., New York, N. Y. (Otto C. Sommerich, Esq., Katz & Sommerich, on the brief), *for Defendant-Appellant.*

MOORE, *Circuit Judge:*

Plaintiff, holder of a non-cancellable income policy of insurance against disability from injury or sickness resulting in loss of business time issued to him by defendant, brought an action in the City Court of the City of New York to recover monthly benefits under the policy alleging total disability by reason of illness to continue his occupation as a surgeon. Because of diversity of citizenship the case was removed to the federal court. Prior to the trial now under review plaintiff was permitted by supplemental complaint to enlarge his claim, originally stated only to include a twelve month period from July 22, 1953 (i.e., $4,800), to cover the entire period up to the date of trial. From a judgment in plaintiff's favor for $24,977.03 upon a jury verdict and upon the court's decision that a release executed by plaintiff was null and void, defendant appeals.

In 1927 defendant issued to plaintiff the disability policy upon which suit is brought. Plaintiff is described therein as "by occupation a Physician and Surgeon." In substance the policy insured against disability resulting from sickness. There was evidence that in 1927 plaintiff was engaged in the practice of general medicine and surgery, but even then tending to specialize in surgery. He also performed obstetrical, gynecological, rectal and prostatic examinations. In 1933 he was admitted to the American College of Surgeons to qualify for which "[i]n Brooklyn at that time it was necessary for 70 per cent of his practice to be surgical and the man should be known as a surgeon

in the community" (Pltf.'s testimony, 175a). Since 1941 plaintiff's practice had been exclusively surgery. During the Second World War he was chief of the surgical service in an Army general hospital.

In 1949 plaintiff developed dermatitis of the hands. For about three years he continued to practice except for periods in which the disease would flare up occasioned by necessary surgical sterilization procedures, such as, vigorous scrubbing of the hands, use of soaps and the wearing of rubber gloves. At that time (1949), plaintiff consulted a well-known dermatologist. Again in September 1952, as a result of a further attack, plaintiff consulted another dermatologist and was under constant treatment by him for some nine months. The condition improved when plaintiff did not engage in sterilization techniques but the dermatitis was not cured.

In October 1952 plaintiff gave up his practice and notified defendant that he was unable to attend to it because of his condition. Thereafter he sought other employment. In March 1953 he applied for, and in August 1953 received, an appointment as Chief of Physical Medicine and Rehabilitation at a Veterans Administration Hospital (for mental patients) in Knoxville, Iowa. His dermatitis condition was observed upon his physical examination for that position. In 1956, after a course of training in administrative medicine, plaintiff was assigned to a Veterans Hospital at Fort Harrison, Montana as Director of Professional Services and Administrative Chairman of the Research Committee. The work was somewhat analogous to that of a hospital superintendent. Although plaintiff was technically practicing medicine in both positions (the positions required a licensed doctor), he did not examine, diagnose or treat patients except for an occasional sprain or bruise.

Appendix.

The Release

In April 1953, after plaintiff had filed his claim, defendant's Claims Representative raised the question as to whether plaintiff was totally disabled. In May 1953 this representative said he could not recommend payment on the basis of total disability but suggested a settlement. Defendant prepared a release. Plaintiff signed the release and received from defendant $1,411.32.

A substantial controversy exists between the parties as to the validity of the release. Plaintiff claims that he executed the document believing a statement by defendant's Claims Representative that if plaintiff took a position with the Veterans Administration he would be resuming his occupation as a physician and surgeon which would preclude him from receiving further total disability payments. This statement being inaccurate, argues plaintiff, the release was executed under a mistake of fact. Defendant vigorously disputes the making of the representation and contends that, if made, it would be a mistake of law rather than a mistake of fact.

The trial court reserved for itself the decision as to the validity of the release but sought an advisory verdict from the jury upon written questions. Upon the question of validity the court's charge was most comprehensive and fair. Only if the mistake is clearly a mistake of law should this court disturb the jury's advisory verdict in favor of plaintiff and the trial court's decision holding the release void.

The border line between mistakes of law and fact is often very thin. Here particularly so. There are very few mistakes of material facts which do not have legal consequences thus enabling persuasive arguments to be made that the mistake is one of law. Decisions in other cases are not too helpful in arriving at the correct result because

the inducing reasons for signing are different in each case. If plaintiff believed as a matter of fact that he would not receive any further disability payments if he took the Veterans Administration position and if defendant did not intend in fact to continue such payments for that reason, a release executed under such circumstances might well come within the equitable doctrine which affords relief when the mistake is material and it determines the conduct of the mistaken parties. The mistake under which the release was signed cannot be viewed as solely one of either fact or law; it related to the appellee's rights and has both factual and legal aspects. "Where there is a mutual mistake as to antecedent prior rights, it has been held that the mistake partakes of the nature of a mistake of fact." *Fidelity & Deposit Co. of Maryland* v. *McQuade*, D. C. Cir., 1941, 123 F. 2d 337, 339. See also *Columbia National Fire Insurance Co.* v. *Dixie Cooperative Mail Order House*, 276 S. W. 219 (Tex. Com. App. 1925). Even if a mistake of law is inadvertently induced, it may serve as a basis of rescission. Thus an ordinary layman may be justified in relying upon an insurance agent to give a reliable opinion upon problems arising out of the insurance contract. *Hudson* v. *Glens Falls Ins. Co.*, 218 N. Y. 133, 112 N. E. 728 (1916). See Restatement, Torts § 545(2), Comment *d* (1938); *cf.* 5 Williston, Contracts § 1591, at 4438-39 (Rev. ed. 1937).[1] As to the claim that the release was not promptly repudiated, the jury's advisory verdict and the court's decision are not clearly erroneous. Upon all the facts it cannot be said as a matter of law that the release was a bar to plaintiff's claim.

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[1] For a general discussion of the law of mistake see Pomeroy's *Equity Jurisprudence* (Fifth Edition), Sections 841 and 847-859.

Appendix.

Plaintiff's Occupation as a Physician and Surgeon

By simple logic, at first impression most compelling, defendant argues that it insured plaintiff as a physician and surgeon; that plaintiff's positions at the Veterans Hospitals could only have been filled by a licensed physician; and that, therefore, he was still functioning as a physician and hence not totally disabled. Quite frequently, however, cold logic can be most unrealistic. Carried to extremes, it could be asserted that so long as plaintiff retained his license to practice he was not totally disabled.[2] The policy and the word "occupation" cannot be so narrowly construed. Occupation is the occupation of the individual policyholder. It is the ability to continue in his particular occupation for which he seeks protection by insurance. If his occupation has become that of a recognized specialist in surgery and he suffers from a physical impairment or disease which causes an uncontrollable tremor of the hands or an infection, such as, dermatitis, resulting in the forced discontinuance of his practice, for all practical purposes there is total disability. He can no longer pursue his real occupation. Against this possibility he may seek insurance protection.

Over the last several decades there has been an increasing tendency in the field of medicine to specialize. Even in surgery there are many fields. If a physician has spent his life as a neurosurgeon or an ophthalmic surgeon he is effectively deprived of his occupation if illness prevents his continuing in that particular field. Technically he is still a physician and theoretically an insurance company

[2] Defendant's Claims Representative, when questioned by the court, conceded that plaintiff would be entitled to disability payments if he were unable to perform the essential functions of a physician and surgeon and became the manager of a hospital (Appellee's Appendix pp. 246a-247a).

could argue that an affliction which would disqualify him from surgery would not prevent him even at advanced years from becoming a general practitioner.

Defendant amassed much evidence tending to prove that the qualifications for plaintiff's Veteran Hospital positions called for a physician. The trial court admitted this evidence and permitted the jury to decide whether plaintiff was able to pursue the occupation of "Physician and Surgeon" as defined in the policy. The trial court instructed the jury that the policy was "to be construed by giving such meaning to the terms used as would be ascribed to them by the average man in applying for the insurance and reading the language of the policy at the time it was written"; that they were not to revise the policy or increase defendant's risk; and that they were to decide "whether the plaintiff and defendant intended that the type of work to be covered by this policy included the work plaintiff has been doing in the Veterans Administration hospitals." The jury's answers to the court's written questions were amply sustained by the evidence and there was no error in denying defendant's motions to dismiss or for judgment notwithstanding the verdict.

The two Arkansas cases construing the same type of policy issued by defendant do not require the setting aside of the jury's verdict. In *Aetna Life Ins. Co.* v. *Orr (Pacific Mutual Life Ins. Co.* v. *Orr)*, 205 Ark. 566, 169 S. W. 2d 651 (1943), the doctor practiced both as a physician and surgeon. His practice as a physician continued in substantial volume. The error was in the court's charge in the light of the particular facts. *Franklin Life Ins. Co.* v. *Burgess*, 219 Ark. 834, 245 S. W. 2d 210 (1952), merely recognized the theory of "dual professions" as stated in the *Orr* case.

Appendix.

Alleged Failure to Comply With Policy

Paragraph 21 of the policy provided that the insurance did not cover "(1) any disability for which the Insured is not necessarily and regularly attended by a legally qualified physician other than the Insured:". Waiver of this requirement was provided for if "attendance is declared by medical authority satisfactory to the Company to be unnecessary;". Defendant points to proof that plaintiff did not consult, nor was he treated by, any dermatologist either in Knoxville, Iowa or Fort Harrison, Montana and that an expert witness had said that he was not incurable. From this proof defendant argues that plaintiff failed to comply with the terms of the policy. Although the statements in some of the opinions relied upon seem to support defendant's position, as is usually the case, the facts are sufficiently different so as to render them inapplicable. In *Theberge* v. *United States*, 2 Cir., 1937, 87 F. 2d 697, the insured refused to undergo treatment for syphilis; in *Mutual Ben. Health & Accident Ass'n* v. *Cohen*, 8 Cir., 1952, 194 F. 2d 232, cert. den., 343 U. S. 965, the policy required regular attendance "at least once a week"; and in *Mutual Life Insurance Co. of New York* v. *Ellison*, 5 Cir., 1955, 223 F. 2d 686, cert. den., 350 U. S. 845, although the facts of the case were most similar, namely, the specialty, surgery and the illness, dermatitis of the hands, the appellate court found that the doctor had completely failed to take any adequate steps to be cured. Here, on the contrary, plaintiff consulted two specialists in dermatology and followed their prescribed course of treatment. Over a period of three years the disease persisted, quieting down when surgery and necessary preparations therefor were avoided and flaring up when they were practiced. The policy uses the words "necessarily and regularly attended." Surely regular attendance for the rest of plaintiff's life would not

be necessary if an honest attempt to cure the infection resulted in convincing failure so that continuance of medical consultation would be productive of no beneficial results as far as any return to surgery was concerned.

Other Insurance

Defendant argues that because of other insurance its liability to plaintiff must be on a pro rata basis. However, the other insurance was disclosed by plaintiff in his statement of sickness disability in November 1952. Thereafter plaintiff paid full premiums on defendant's policy, no part of which was returned as provided for in the policy. Furthermore, the terms of the other policies were different.

The Supplemental Complaint

The supplemental complaint merely sought damages up to the date of trial; not in the future. The amendment allowed by pretrial order pursuant to Federal Rule of Civil Procedure 15(d) was proper.

The judgment is affirmed.

2. Judgment of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of June one thousand nine hundred and fifty nine.

Present:

HON. GEORGE T. WASHINGTON,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

GEORGE GRAVES DIXON,

Plaintiff-Appelee,

v.

PACIFIC MUTUAL LIFE INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. Daniel Fusaro,
Clerk.

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JAMES R. BROWNING, Clerk

Supreme Court of the United States

October Term, 1959

No. 598

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

GEORGE GRAVES DIXON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 598

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

GEORGE GRAVES DIXON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The unanimous affirmance and opinion of the Court of Appeals is reported in 268 Fed. 2d 812. Petition for rehearing was unanimously denied (R. 299(a), 300(a)). The opinion of the Trial Judge after the first trial (Weinfeld, J.) is reported in 151 Fed. 2d 106 (R. 168a-170a). The comment of the Trial Judge (Sugarman, J.), after the rendition of the verdict at the second trial which was reviewed by the Court of Appeals is found at R. 127a, 128a.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C. A. Section 1254 (1). However, the petition fails to specify any important and special reasons why in

this case under the facts found by the Trial Judge, Jury, and the Court of Appeals a writ of certiorari should be granted nor does it indicate that any special ground for the granting of a writ as set forth in Rule 19 of the Revised Rules of this Court exists. The sole contention raised by the petitioner that the Court of Appeals did not follow New York law, even if correct, is rarely accepted as sufficient for the granting of a writ in a case of this kind. In any event, the decision and opinion of the Court of Appeals and the District Court does not, in fact, conflict with New York law, nor is there any conflict existing with any decisions of another Court of Appeals on the same issues.

Counterstatement of the Case

The questions as framed by the petitioner and the evidence related by it to support its position do not contain the important and correct evidence as to whether or not this case is properly the subject for the granting of a writ. It becomes, therefore, necessary to set forth additional facts not embraced in the petitioner's statement.

There were two trials. At the first trial the Jury likewise found that there was a mutual mistake of fact with respect to the release and that the respondent was disabled within the meaning of the policy. This verdict was set aside only upon the ground that the Jury under a misapprehension found the terminal date of disability the sixtieth birthday of the insured instead of to the subsequent date of the trial but all other contentions raised by the petitioner and now raised were denied by the Trial Judge (R. 168a-170a).

After the second trial, which was reviewed by the Court of Appeals, the Trial Court commented that the company's position was highly immoral; that had the advisory Jury

on the issue of release found for the petitioner the Court would not have followed its advice and had it found for the petitioner on the issue of disability it would have set the verdict aside (R. 127a, 128a). Both Trial Judges granted respondent's motion to amend the complaint to claim disability benefits to the date of trial, pursuant to Federal Rule 15(d).

On both trials there was submitted to the Jury for determination the issue whether respondent was disabled from performing the essential duties of both a physician and surgeon and both Juries found him so disabled (R. 125a, 126a, 168a 170a). The testimony was overwhelming that the respondent in his occupations with the Veterans Administration hospitals did not examine, diagnose, prescribe for nor treat patients but was doing administrative work (R. 185a, 186a, 195a, 196a, 201a-204a). The Court of Appeals likewise so found (Appendix, p. 23). It was proven that because of the disease of "contact dermatitis", which caused his hands to flare up when he attempted to sterilize them or keep them clean, he was unable to practice either as a physician or surgeon (R. 176a, 182a, 183a, 206a, 212a). It was stipulated in the pretrial Order that sterility of the hands is essential in surgery and cleanliness of the hands essential in the practice of medicine (R. 163a). At the commencement of his disability Dr. Dixon was practicing exclusively as a surgeon (174a, 175a).

The testimony was that medical treatment for this condition would serve no beneficial purpose and was not necessary (R. 193a, 197a, 214a, 215a, 217a, 219a). In fact, petitioner's medical expert conceded that the best therapy for Dr. Dixon was to cease practicing (R. 229a, 235a, 236a). The Court of Appeals found that respondent "consulted two specialists in dermatology and followed their prescribed course of treatment. Over a period of three years the dis-

case persisted, quieting down when surgery and necessary preparations therefor were avoided and flaring up when they were practiced" (Appendix, p. 28).

With respect to the release, although the petitioner knew that Dr. Dixon was disabled and would continue to be disabled, having received the medical reports to that effect from its experts (R. 259a, 262a, 238a, 239a), it nevertheless suggested the settlement (R. 247a).

When the release was executed the respondent had already accepted a job with the Veterans Administration (R. 94a, 96a, 97a, 254a). Petitioner's Claims Manager told Dr. Dixon that when he commenced working with the Veterans Administration, which appointment Dr. Dixon had obtained and had accepted, he would not receive any further disability benefits (R. 87a, 90a, 94a, 95a, 96a, 99a, 249a, 251a). Dr. Dixon did not know that he would still be entitled to disability benefits (R. 251a, 252a) and "in agreeing to the settlement, in signing the release" he relied upon these representations of the Claims Manager (R. 94a, 249a, 251a). The petitioner's Claims Manager testified that his knowledge that Dr. Dixon had received this job with the Veterans Administration was one of the basis for suggesting a settlement (R. 246a, 247a, 83a, 84a). The amount of $1411.32 paid was the approximate amount due Dr. Dixon to the date of the release.

He was not represented by counsel (R. 248a). The respondent's attorney who later represented him in this matter wrote a letter to the petitioner requesting claim forms for submission of proof of continuing disability from the same disease clearly inferring that Dr. Dixon was not recognizing the validity of the release (R. 263a, 264a).

Argument

(1) This Court has declared its policy of rarely granting a petition in a case of this kind where the purpose is to have this Court review findings of facts and the decision of the Court of Appeals on applicable local law.

Hinckle v. *New England Mutual Life Insurance Company*, 358 U. S. 65;
Dick v. *New York Life Insurance Company*, 359 U. S. 437;
General Box Company v. *U. S.*, 351 U. S. 159;
Ragan v. *Merchants Transfer Company*, 337 U. S. 530;
Graver Mfg. Co. v. *Linde Co.*, 336 U. S. 271.

(2) In any event, as will be hereinafter shown, on each of the issues determined there was no conflict between the decision and opinion of the Court of Appeals and New York law nor is there any conflict existing on any of the issues between the Court of Appeals of the Second Circuit and any other Circuit and the findings of fact were based upon substantial evidence.

(3) As heretofore pointed out, the issue as to whether the respondent was disabled both as a physician and surgeon was, in fact, submitted to the Jury which determined that Dr. Dixon was disabled in both capacities. There was, therefore, no conflict with the decision of the New York Court of Appeals in *Metcalf* v. *Equitable Life Assurance Society*, 292 N. Y. 419. We argued, in addition, in the Court of Appeals, although not necessary to sustain the verdict that he was disabled both as a physician and surgeon, that under the policy in suit the insured had a right to change his occupation (R. 250a) and hence he was only required to prove that he was disabled as a surgeon, which was his uncontroverted occupation (R. 174a, 175a). A

determination of this question by the Court of Appeals was not necessary for the affirmance of the Jury's verdict that he was disabled both as a physician and surgeon.

(4) The testimony was overwhelming and in fact admitted that medical treatment would have no likely beneficial result and the best therapy for Dr. Dixon was to cease practicing. Under such circumstances he was not required to prove medical treatment. The latest New York cases are in full accord (*Ottey* v. *National Casualty Company*, 192 Misc. 902, 81 N. Y. S. 2d 534; *Goldbard* v. *Empire Mutual Insurance Company*, 156 N. Y. S. 2d 324; mod. 164 N. Y. S. 2d 294, mod. 5 A. D. 2d 230; *Hunter* v. *Federal Casualty Company*, 199 App. Div. 223; *Harasymczuk* v. *Massachusetts Accident Co.*, 127 Misc. 344).

Judge Weinfeld after the first trial rejected the contentions of the petitioner and adopted the cited cases as representing New York law (151 Fed. 2d 106; R. 168-170). Judge Sugarman at the second trial unqualifiedly adopted his opinion (R. 255a). The Court of Appeals agreed (Appendix, p. 28).

(5) With respect to the release, the petitioner affirmatively pleaded both release and accord and satisfaction (R. 9a-10a) and in the pretrial Order stipulated "that the trial of this action shall be based upon the pleadings as amended" (R. 162a) and that the issue to be tried amongst others was "(1) the validity of the release" (R. 167a). At the trial the petitioner pressed its contention which was accepted that it has "the burden of establishing that this claim was released and that there was an accord and satisfaction" (R. 191a). No motion by the petitioner with respect to the pleadings was made at any time. In any event "failure to so amend does not affect the result of the trial of these issues" (Federal Rule 15(b)—also Fed-

eral Rule 61). There was no need of tender of the amount received prior to suit (Section 1126 of the New York Civil Practice Act), *Ciletti* v. *Union Pacific Railway Company* (196 Fed. 2d 50, Sec. Cir., 1952).

Under New York Procedural law "cases where defendant has not taken advantage of the Frehe rule by moving with respect to the sufficiency of the complaint are not applicable" (*Frankenheim* v. *B. Altman & Co.*, 1 App. Div. 2d 200). No motion attacking the complaint was made and in any event the amount paid in settlement was deducted from the demand for judgment in the amended complaint and in the verdict (R. 161a, 152a).

Furthermore, under New York law where the answer pleads release the issue whether it was fairly and knowingly made is triable (*Finke* v. *Iris Cab Corp.*, 1 App. Div. 2d 692, a. dis. 1 N. Y. 2d 851, a. den., 2 App. Div. 2d 780, a. dis. 2 N. Y. 2d 722).

(6) When the petitioner's Claims Manager represented to Dr. Dixon that it would not pay him disability benefits when he commenced working for the Veterans Administration in an administrative capacity, the respondent had already received his appointment and had taken the job and so informed the company (R. 94a, 96a, 97a). Dr. Dixon "in agreeing to the settlement, in signing the release" relied upon the representations of the Claims Manager (R. 94a, 249a, 251a).

The facts in the cases cited by the petitioner differ from the facts herein proven. The exhaustive opinion of the Court of Appeals and the authorities cited on the applicable law are in full accord not only with general law but with New York law. *Hudson* v. *Glens Falls Insurance Company*, 218 N. Y. 133, cited by the Court of Appeals (Appendix, p. 25) is directly in point on the factual situa

tion herein proven. See also: *Ginsburg* v. *Equitable Life Assurance Society*, 254 App. Div. 445.

In the Court of Appeals the petitioner never contended that the Court's charge did not correctly state the New York law on both the issues of release and disability nor was the charge challenged in any respect. The Court of Appeals observed that the Court's charge was most comprehensive and fair (Appendix, pp. 24, 27).

(7) Upon the first trial a motion was similarly made and granted permitting the amendment of the complaint to the date of trial. The amendment at the second trial was allowed under the pretrial Order, pursuant to Rule 15 (d) of the Federal Rules, to avoid a multiplicity of suits as fully explained by the Trial Court (R. 162a, 171a, 172a). There was no amendment nor was any sought for the recovery of disability benefits beyond the date of trial. The evidence adduced by both sides at the trial was limited solely to the period of disability up to the date of trial and the Jury so found and were instructed to limit the recovery to this period (R. 121a, 126a). The Court of Appeals held "the supplemental complaint merely sought damages up to the date of trial; not in the future. The amendment allowed by pretrial Order pursuant to Federal Rule of Civil Procedure 15 (d) was proper" (Appendix, p. 29).

The cases cited by the petitioner, including *Morgan* v. *Aetna Life Insurance Company*, 157 Fed. 2d 527, dealt with cases where the insured sought for or obtained a decree entitling him to benefits beyond the date of the trial and have no analogy to the case at bar.

Conclusion

(1) The decision of the Court of Appeals is correct.

(2) The petition fails to present any important or special reasons for granting the writ.

(3) There is no conflict between the decisions of the Courts below and the New York Courts nor between the Court of Appeals of this circuit with another circuit on any of the issues.

(4) The findings of fact were based upon substantial evidence.

(5) In any event, petitioner's contentions, assuming they are correct, are insufficient for the granting of the writ.

(6) The application is without merit.

(7) It is therefore respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

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